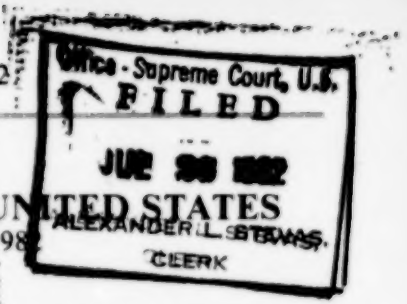
Docket No. 81-2332



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 198

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a political subdivision of the Commonwealth of Virginia,

Petitioner,

v.

THE CHESAPEAKE AND POTOMACK TELEPHONE COMPANY OF VIRGINIA,

Respondent,

MOTION OF THE BOISE REDEVELOPMENT AGENCY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

BRIEF OF THE CITY OF BOISE, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, AND THE BOISE REDEVELOPMENT AGENCY, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO, AS AMICI CURIAE IN SUPPORT OF PETITIONER, NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY

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Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE BOISE REDEVELOPMENT AGENCY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY

The Boise Redevelopment Agency (BRA) respectfully moves the Court for leave to

file the attached Brief as an amicus curiae in support of the Petitioner, and, in the event such motion is needed, to file the attached brief out of time.

The interest of the BRA in the subject matter is more fully set out in the Brief. In summary, there is now pending before the Supreme Court of the State of Idaho a case entitled Mountain States Telephone & Telegraph Company, et al., Appellants, vs. Boise Redevelopment Agency, Respondent, Case No. 13997. In that case that court has before it the question of whether or not a public utility is a displaced person under the Uniform Relocation Assistance & Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601, et seq., for the purpose of reimbursement for the cost of removing distribution facilities from public

rights-of-way caused by an urban renewal project funded in part by grants from the Department of Housing and Urban Development. Under Idaho law a public utility's use of rights-of-way is permissive, and the utilities bear the cost of relocating or removing facilities from such rights-of-way. The Idaho courts have, to date, recognized the status of utilities as permissive users, and refused them relocation assistance.

If the decision of the Court of Appeals of the Fourth Circuit is affirmed or is treated as controlling or persuasive authority in the Idaho case, it will have grave economic impact upon the BRA. The claims for utility relocation reimbursement could equal or exceed funds now set aside for completion of the urban renewal project within the City of Boise.

All funds now allocated for the project are necessary for its completion. In the event that the costs of the project were to be increased by utility relocation costs, the project may either become infeasible or may require the inclusion of public monies. The decision of the Fourth Circuit could, therefore, result in the application of local public monies to relocation assistance for public utilities despite the fact that local law gives those utilities no right to such funds.

Under Rule 36.2, this Brief is timely filed pursuant to Rule 36.1 in support of the Petition for Writ of Certiorari.

The BRA seeks to join in the attached Brief as amicus curiae with the City of Boise which is a political subdivision of the State of Idaho. Counsel for the BRA

in this matter have been appointed as special City Attorney for the purpose of appearances before this Court. Consent is not required pursuant to Rule 36.4 for the City of Boise's filing of an amicus curiae brief before this Court because it is a political subdivision of the State of Idaho. Consent of all parties has been sought for BRA participation as amicus curiae with the City of Boise. Petitioner has granted consent to the BRA to file an amicus brief in conjunction with the City of Boise, and Petitioner has filed with the Clerk of the Court its letter acknowledging that consent. The Chesapeake and Potomac Telephone Company of Virginia has withheld its consent to the BRA to file an amicus brief. For that reason the BRA now makes this motion for leave to join with the City of Boise

as an amicus curiae in support of Petitioner.

In the event that this Court denies the BRA leave to file as an amicus curiae with the City of Boise, Idaho, in support of Petitioner, the City of Boise still files the attached Brief as amicus curiae, without involvement of the BRA.

If an amicus curiae brief in support of Petitioner is timely only at the time Petitioner's principal brief is filed, BRA moves for leave to file the attached brief out of time and moves for leave to make the motion out of the time set pursuant to Rule 29.

WHEREFORE,

1. If the Boise Redevelopment Agency is required to seek leave of this Court to join in the filing of the attached brief as amicus curiae with the City of

Boise, the Boise Redevelopment Agency does so move.

2. In the event that it is necessary to seek leave of this Court to file the attached brief out of time, the Boise Redevelopment Agency respectfully moves for leave to make this motion and for leave to file the attached brief as amicus curiae with the City of Boise.

3. In the event this Motion should not be granted, the City of Boise would file the attached brief as amicus curiae without participation by the BRA.

RESPECTFULLY SUBMITTED.

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INTERESTS OF THE AMICI CURIAE

The Idaho Supreme Court has before it, in the case of Mountain States Telephone and Telegraph Company, et al v. Boise Redevelopment Agency, Case No.

13977, the question of whether or not a public utility is a "displaced person" under the Uniform Relocation Act ("URA"), 42 U.S.C. 4601 et seq., when the utility seeks reimbursement for the costs of removing or relocating distribution facilities from public rights-of-way, which the utilities occupied without cost. The relocation in that case occurred in the execution of the Boise City urban renewal projects funded in part by federal grants from the Department of Housing and Urban Development. All briefs in that case have been submitted, but no date has been set for oral argument.

In the meantime, the United States Court of Appeals for the Fourth Circuit has entered its decision, which is the object of the Petition for Certiorari, on the same question as that before the

Idaho Supreme Court. The Fourth Circuit's decision is directly contrary to the decision of the lower Idaho court and of other courts which have addressed the issue. Nonetheless, because it is the most recent reported decision, the amici curiae fear that it will be treated as controlling or compelling authority by the Supreme Court of Idaho.

The impact of the opinion and judgment of the United States Court of Appeals for the Fourth Circuit will adversely impact the urban renewal project in Boise, Idaho. For example, the Boise Redevelopment Agency (BRA) has federal funds allocated to it by and through the City of Boise in a total amount of $6,154,000 to complete its urban renewal project, but the BRA has no authority to

levy taxes, ad valorem or otherwise. There are no further federal funds which can be obtained for the project other than those previously allocated. As it now stands all the funding for the Boise urban renewal project will barely meet its anticipated cost, if no further expenditure is required for utility relocation. However, anticipated claims for the entire urban renewal area by public utilities for relocation or removal of their facilities is approximately 1.5 million dollars. Consequently, any shortfall in funds necessary to complete the urban renewal project will either spell the death of the project as currently planned or require the City of Boise to fund the project out of its operating revenues.

The City of Boise faces the anomalous situation of reimbursing utilities for relocation of their facilities, even though those utilities use the public rights-of-way at their own risk under state law without cost or payment of a fee. Mountain States Telephone and Telegraph Co., et al v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980). In effect, the City of Boise could be faced with the situation of paying the utilities for relocation costs to which they are not otherwise entitled under state law.

STATEMENT OF THE CASE

The City of Boise and the Boise Redevelopment Agency (BRA) adopt the statement of the case as set forth in the Petition for Writ of Certiorari of the

Norfolk Redevelopment and Housing Authority, pp. 3-9.

SUMMARY OF THE ARGUMENT

The holding of the Court of Appeals for the Fourth Circuit[1] is contrary to the decisions of the Court of Appeals for the Sixth Circuit and the District Court for the Eastern District of Michigan in Consumers Power Co. v. Costle, 615 F.2d 1147 (1980) and 468 F. Supp. 375 (1979), respectively. It is also contrary to unpublished decisions of the Northern and Eastern Districts of Oklahoma, Public Service Company of Oklahoma v. Harris, et al., No. 79-C-37 Bt (1980) and Lone Star

---

1. This holding, sub nom, Norfolk Redevelopment and Housing Authority v. The Chesapeake and Potomac Telephone Company of Virginia, is the subject of the Petition for Certiorari before the Court.

Gas Co. v. Landrieu, No. 52-100-C (1981), and the California courts interpreting California's parallel statute. It dramatically upsets the settled law of the majority of American jurisdictions, by granting a compensable right in utilities which already enjoy a gratuitous use of the public's rights-of-way for their facilities.

The law of most American jurisdictions (including Virginia and Idaho) is that utilities enjoy the free use of public street and highway rights-of-way on the conditions that they do so at their sole risk, and that, if compelled to relocate their facilities they must do so at their sole cost. This rule represents a substantial subsidy to the utilities; it insulates them from land acqui-

sition costs, both for their original location and for any "relocation." The legislative and regulatory policy of most states is to limit the subsidy and to have costs of facility relocation spread among users through the rate base rather than among the public generally. The decision of the Fourth Circuit contravenes that policy and provides for a subsidy on top of a subsidy.

The language of the URA and its history do not support the Fourth Circuit decision. There is no statutory language changing the traditional treatment of utilities. Parallel state and federal laws and the administration of the federal regulations by the Department of Housing and Urban Development are contrary to the Fourth Circuit position. The legislative history of the URA and

its language focuses on hardships caused to urban dwellers who are subject to condemnation and then faced with significant relocation expense caused by high urban real property costs but not covered by condemnation proceeds. Utilities do not fall within these purposes of the law. They do not have (in most jurisdictions) a condemnable interest in public rights-of-way and, therefore, no eminent domain right to which relocation funds can be appended. Utilities do not require a new subsidy, having already a large existing subsidy immunizing them from high property costs. They can relocate for free. Utilities are not displaced urban dwellers within the purpose of the law.

Existing projects have been funded based upon the well-established law denying condemnation and attendant relocation

recoveries to utilities. The Fourth Circuit's decision threatens the viability of those projects. There are few new federal or local funds available for urban-area projects. The funding for existing urban renewal projects in Boise projects is becoming marginal because of inflation and interest rates. An imposition of relocation costs will stretch these funds. The judiciary should not take such action without clear statutory authority.

ARGUMENT

I.

THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS DEPARTS FROM SETTLED PRINCIPLES OF STATE COMMON LAW

A. The Fourth Circuit's Departure From Settled Law Will Jeopardize Completion Of Existing Projects.

Idaho, as a majority of the states follows the common law rule requiring public utilities to relocate their facilities from public rights-of-way at their own expense. See, Mountain States Telephone and Telegraph Co., et al. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980). In that case the Idaho Supreme Court interpreted the Idaho Urban Renewal Act, Idaho Code § 50-2001 et seq. and held that it did not require relocation compensation since the legislature neither abrogated nor abolished the common law rule, stating in part:

> . . . As indicated in State v. Idaho Power Co., supra, [81 Idaho 487, 346 P.2d 596 (1959)] this is a risk accepted by the utilities when they accept the use of public streets and highways, and we will not legislate a change in the area of compensation for relocation costs.

Urban renewal agencies and cities in the State of Idaho consequently have no potential liability under settled state law for payment of relocation costs to public utilities with facilities in public rights-of-way dislocated or displaced as the result of urban renewal.

The decision of the Fourth Circuit Court of Appeals could jeopardize the completion of the Boise urban renewal project. The estimated public utility relocation costs are substantial. There are no excess funds available to provide relocation monies for utilities. The BRA is not authorized under state law to levy taxes of any kind to pay for urban renewal. See, Boise Redevelopment Agency v. Yick Kong Corporation, 94 Idaho 876, 884, 499 P.2d 575 (1972). The BRA simply cannot spend beyond its own funds and

property holdings and faces the prospect of being incapable of completing the project as planned, if there is a shortfall.

The City of Boise faces an equally distressing problem. Pursuant to a specific finding that the downtown core suffered from deteriorating urban blight, the City of Boise created the BRA and approved its redevelopment plan on March 22, 1971. According to the approved plan, the BRA razed seven city blocks, partially developed three blocks, and have targeted four more city blocks for demolition. If the BRA cannot complete the redevelopment project because of this extra expense, the City of Boise faces the dilemma of having four razed and bare city blocks and numerous vacant buildings in the center of its downtown core without the resources to fund or complete the

redevelopment project with the attendant declining tax base and with urban blight more severe than prior to adoption of the redevelopment plan. Thus, either directly or indirectly, the City will have to cover the costs of utility relocation out of its own funds, not out of any federal subsidy.

B. Public Utilities Enjoy a Substantial Subsidy Under State Law, and the Circuit Court's Decision Will Unfairly Provide a Double Subsidy.

The cost of relocating public utility facilities from public rights-of-way should be borne by the public utilities as provided by state law. Public utilities, which occupy public rights-of-way without cost, already receive, in fact, a substantial subsidy from local govern-

ments in general by virtue of the free use of the public rights-of-way. They have no real property costs. Unlike other businesses in Idaho, public utilities receive this subsidy and with only a single caveat; i.e., placement of facilities in the public rights-of-way is at their own risk. Since these public utilities have no property cost, they have no property right in the public rights-of-way. Therefore, relocation compensation would provide a windfall to the utilities and, indeed, a second subsidy at the expense of local government such as the City of Boise and the BRA. The payment of relocation compensation to such public utilities would actually be payment by local governments to public utilities for their free use of public rights-of-way.

The equities weigh heavily against compensating public utilities for relocation costs, since they would in many instances receive, in effect, double payments for relocation costs. Idaho like many other states has adopted the Uniform System of Accounting for public utilities. For example, the Idaho Public Utilities Commission by rule, IPUC Rule 31, N, P and S, adopted the Federal Communication Commission and Federal Energy Regulatory Commission Rules on utility accounting. See 47 C.F.R., Chapter B, parts, 31 and 32; 18 C.F.R., Chapter 1, subpart c and f. Under these rules expenses of relocation and asset acquisition under these rules would be capitalized and added into the respective utility's rate base so that all users will then pay equally for the relocation

cost through increased rates. That is a express decision on the appropriate method for socialization of utility relocation costs, made by the government agency responsible for that specific issue regardless of the size of the utility's service area. The general public subsidy for utility location ends with the free land.

II.

CONGRESS DID NOT INTEND PRIVATE PUBLIC UTILITIES TO RECEIVE RELOCATION BENEFITS UNDER THE UNIFORM RELOCATION ACT

A. The Legislative History Reveals A Purpose To Aid Displaced People Facing High Relocation Costs In Urban Areas.

The legislative history shows that Congress enacted the URA for the purpose of compensating only those persons suffering from disproportionate costs and

expenses as a result of a Fifth Amendment taking. The URA provides only supplementary compensation rather than alternative compensation to displaced persons who have in some degree suffered a taking of real property.

Privately owned public utilities enjoying gratuitous use of the public rights-of-way cannot seriously argue that they suffer from the sort of social ill or malady which Congress sought to correct. Their rent-free use of the public rights-of-way has redounded to their advantage over the years as a direct subsidy from the general public by reducing their total operating costs. It would be incongruous to reward public utilities with relocation compensation for removing facilities from public rights-of-way which they have occupied

without cost. Moreover, it is doubly incongruous to pay the utilities relocation monies them to move to another free right-of-way.

The House Report on the Uniform Relocation Act clearly indicates Congress's purpose was to aid displaced people and not public utilities:

> . . . The need for such legislation arises from the increasing impact of federal and federally assisted programs as such programs have evolved to meet the needs of a growing and increasing urban population. In a less complex time, Federal and federally assisted public works projects seldom involved major displacements of people. There was relatively little taking of residential or commercial property for farm--to-market routes or for reservoirs or public buildings. Indeed, local support for such projects often resulted in little, if any, cost for land acquisition or rights-of-way. However, with the growth and development of an economy which is increasingly urban and

> metropolitan, the demand for public facilities and services has increasingly centered on such urban areas, and the acquisition of land for such projects has become the most difficult facet of many undertakings by public agencies. Also, a major public project -- be it a highway, urban renewal project, or hospital -- inevitably involves the acquisition and clearance of sites which now provide residential, commercial, or other services. As the thrust of Federal and federally assisted programs have shifted from rural to urban situations, it became increasinly apparent that the application of traditional concepts of valuation and eminent domain resulted in inequitable treatment for large numbers of people displaced by public action. [Emphasis added]

House Report No. 91-1656 at U. S. Congressional & Legislative News, 1970, pp. 5850-5851.

> This legislation refines and strengthens the basic principles and programs in S.1. as passed by the Senate. It provides a humanitarian program of relocation payments, advi-

> sory assistance, assurance that comparable, decent, safe, and sanitary replacement housing will be available for displaced persons prior to displacement, economic adjustments, and other assistance to owners and tenants displaced from their homes, farms and places of business. It establishes a uniform policy on real property acquisition practice for all Federal and federally assisted programs. And, perhaps most important of all, it gets to the heart of the dislocation problem by providing the means for positive action to increase the available housing supply for displaced low and moderate income families and individuals.

House Report No. 91-1656 at U. S. Congressional & Legislative News, p. 5052 (1970)

Congress recognized the inequities resulting from the strict application of eminent domain concepts to large numbers of persons living in urban regions. Hence, the Congress enacted this legislation to provide supplementary compensation to people suffering from a Fifth

Amendment taking of property. Consider for example:

> The lack of decent, safe and sanitary rental housing for displaced . . . families and individuals, at rentals they can afford, presents the most difficult of all relocation problems. These persons are generally tenants at will for suffrance who receive no compensation whatever upon displacement under eminent domain concepts of just compensation.

House Report No. 91-1656, supra, at p. 5861.

The Senate Report on the Uniform Relocation Act also states that the act "is designed to permit the federal government to deal consistently and fairly with all those whose property is taken for public projects and all those who are displaced from their homes and businesses." Senate Report No. 91-488.

B. The URA Was Intended to Apply Only Where There Existed And As a Supplement To A Right To An Eminent Domain Recovery Under the Fifth Amendment -- And There Is No Such Right Extended To Public Utilities.

Running throughout these expressions of legislative purpose is an implicit congressional concern for persons who, once displaced, are faced with high costs of scarce urban real property when they relocate. Such concerns are uniquely inapplicable to public utilities, since their original location was subsidized with free land, and since their relocation is subsidized with more free land. In exchange for that very substantial subsidy, the law of most states, including Idaho, cuts off the subsidy only to the extent of requiring that, on

the relatively few occasions when they are moved, the utilities pay their own costs of moving to their next free right-of-way.

Congress did not intend to aid or assist utilities who gratuitously use public rights-of-way. Indeed, the URA is supposed to be a "people-oriented bill" to compensate those who would ordinarily be denied it through the operation of the principle of just compensation when there is a taking. One commentator explains the scope of the URA as only providing supplementary compensation to a Fifth Amendment taking:

> . . . The context of the Act strongly suggests that Congress intended the URA to play a purely supplementary roll to the existing mechanism of Fifth Amendment compensation. The problem that Congress sought to address in the Act, and in the piecemeal legislation that pre-

ceded it, was manifestly not the lack of compensation in non-fifth amendment acquisitions, but was instead the failure of the Fifth Amendment to compensate all losses in cases in which the amendment did not apply. Congress otherwise would not merely have created legislation directed only at displacement costs. Rather, Congress would have provided that the government pay fair market value for the actual property lost in non-fifth amendment acquisitions.

Any interpretation of the URA that allows displacement compensation in the absence of an award of just compensation would create the anomalous situation in which a displacee might collect compensation for displacement costs but not be compensated for the market value of the property actually acquired. Congress should not be presumed to have intended such a result except in those situations in which it has made its intent unmistakeably clear. (Emphasis supplied) Note, 58 Boston Univ. L. Rev. 596, 690 (1978).

The Supreme Court of Idaho has held that a public utility's use of the public

rights-of-way is permissive in the case of Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980), stating:

> There is no taking of property here, as we have noted above, merely the termination of a license to use particular streets.

607 P.2d at 1089, 101 Idaho at 35.

If a public utility had possessed an interest in real property which, if then, was compensable under state law if taken, then the supplementary compensation provided by the URA would apply. Consider, for example, Senator Muskie's statement on the Senate version of the Uniform Relocation Act:

> . . . the Uniform Relocation Assistance and Land Acquisition Policies Act of 1969, is de-

signed to provide for uniform and equitable treatment of persons displaced from their homes, businesses, or farms by a federal or federally assisted programs, and to establish uniform and equitable land acquisition policies for federal and federally assisted programs.

The accelerating demands for public services of all kinds, and the attendant growth in population, particularly in urban areas, has brought with it the shattering effect of people displaced from their homes, their neighborhoods, and their businesses to make way for public projects. . . .

In large part, S. 1 is designed to permit the federal government to deal consistently and fairly with all those whose property is taken for public projects and all those who are displaced from their homes and their businesses. It follows as closely as possible the substantive provisions of the Housing and Urban Development Act and the Federal Highway Act, modifying them only as necessary to achieve a system of requirements and aids that can be applied uniformly in all federal and federally assisted programs. . . . [Emphasis supplied]

Senate Report No. 91-488.

Surely public utilities cannot claim they suffer from the "shattering effect" of displacement of which Senator Muskie spoke? They are largely immune to high costs of urban land. Moreover, the public utilities cannot claim that their property has been taken, since, as in Idaho, they only have a permissive use of the public rights-of-way.

C. **The URA Will Not Apply To Utility Relocation When Read Consistently With Other Federal Relocation Laws.**

The selective repeal of other prior legislation providing for relocation compensation illustrates an express indication of legislative intent to deny relocation benefits to public utilities. The URA conspicuously failed to repeal

any prior law which denied compensation to utilities for relocation or moving expenses. For example, in repealing Chapter 5 of the law dealing with the Federal-Aid Highways Act, Congress retained 23 U.S.C. 123(a) which prohibits federal compensation for relocation of utility facilities unless expressly required by state law. 23 U.S.C. 123(a) provides in part:

> When a state shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal aid primary or secondary systems or on the interstate system, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State . . .

Congress chose only to repeal those provisions of Chapter 5 of Title 23 relating to relocation assistance in general and intentionally left 23 U.S.C. 123(a) standing. The federal-aid highway and interstate system is one of the largest federal programs contributing to the dislocation of public utilities. Yet, Congress required that state law be paramount in determining the reimbursement of states for relocating utilities. This is consistent with Senator Muskie's remarks indicating that the Uniform Relocation Act did not alter the substantive provisions of either the Housing and Urban Development Act or the Federal Highways Act.

While the Housing and Urban Development Act lacked a provision paralleling

23 U.S.C. 123(a), the Department of Housing and Urban Development nonetheless promulgated a rule to the same effect in its handbook prescribing the federal policies and requirements applicable to a local planning agency for urban renewal projects under Title 1 of the Housing Act of 1949 as amended:

> Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expenditure unless compensation to the company is required under applicable state statutes, judicial decisions, or pre-existing local ordinances or provisions of the company's franchise. If the LPA (local planning agency) is required to compensate the utility company for proposed changes, the necessity for making the changes and the basis used in computing the estimated amount of such compensation shall be described. A legal opinion as to the obligations of the LPA to provide the compensation indicated shall be provided with the Part I loan and grant application.

(A copy of Chapter 2, "Site Clearance: HUD Handbook is attached in Appendix A)

The Housing Act of 1949, as amended, is the seminal legislation for urban renewal projects, and it is under this Act that the BRA received its funding for its urban renewal projects. Pursuant to this act HUD has by regulation clearly excepted privately owned utilities from relocation costs under the 1949 Housing Act. The HUD regulations implementing the URA, 24 C.F.R. 42.1 et seq., control state agency action:

> All determinations or other actions provided by the state agency provided for under the regulations in this part shall be undertaken in accordance with policies and requirements of HUD as issued from time to time.

24 C.F.R. 42.195. (Superseded, but see 24 C.F.R. 42.3 (1981).)

The policies and requirements of HUD for the payment of utility relocation costs under the Housing Act of 1949 have remained unchanged despite the passage of the Uniform Relocation Act. Narrow adherence to the provisions of the URA and its regulations will result in an improper interpretation of the URA in conflict with the HUD policies and requirements.

HUD urban renewal policies predated the enactment of the URA and have remained unchanged for twelve years. HUD policy defers to the law of the state and the law in Idaho clearly and unequivocally denies compensation to public utilities for relocation of their facilities from public rights of way. The URA is not funded by Congress for relocation compensation, but instead, as a result of

the Fourth Circuit Court of Appeals decision, relocation compensation will be borne by local government, which is ill-equipped to bear such costs.

III.

THE FOURTH CIRCUIT COURT OF APPEALS DECISION IS CONTRARY TO SETTLED FEDERAL CASE LAW WHICH DENIES RELOCATION COMPENSATION TO UTILITIES ENJOYING GRATUITIOUS USE OF PUBLIC RIGHTS-OF-WAY

The Fourth Circuit Court of Appeals decision has ruled that the Uniform Relocation Act created rights not recognized at common law. In concluding that a public utility was a "displaced person" under the URA, the Fourth Circuit Court of Appeals reasoned that a public utility was similar to a tenant at will:

> A tenant at will, for example, can recover relocation as a displaced person under the act

> even though the common law recognize no such right. The plaintiff in this case in certain respects, is similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city. Petitioner's Appendix, A-6.

However, the Circuit Court's analogy is inapposite. Public utilities are neither renters nor lessees of real property. Indeed, public utilities unlike renters or lessees use the public rights-of-way freely without any payment.

Consequently, the public utilities' use of public rights-of-ways is gratuitous while that of the renter or lessee of real property is contractual, requiring payment. Hence, the utility enjoys a substantial public subsidy at both its original free location and its new, equally free, "relocation." An ordinary tenant at will, conversely, will pay for

the right to use both his old and new site, without any subsidy except relocation funds. Congress certainly sought to aid families and individuals who are renters and who require decent, sanitary housing. See, House Report No. 91-1656 U.S. Code Congressional and Legislative News, 1970, 5861.

Next, the Fourth Circuit Court of Appeals reasoned that the legislative history of the URA provided little reason to exclude public utilities from its coverage. The court said that the act was intended to establish uniform and fair policy for the treatment of owners, tenants and others displaced by the acquisition of real property in federal and federally assisted programs, to the end that such people shall not suffer disproportionate injuries. The courts'

interpretation of the URA policy ignores that part of the act's legislative history which indicates that the URA was to be a "people-oriented bill." First, the URA provides only supplementary compensation to persons suffering from a Fifth Amendment taking of property. Second, the URA provides for two types of compensation: relocation assistance (subchapter II), and compensation for taking of property (subchapter III). Subchapter III, however, does not create or expand a person's rights or liabilities for compensation upon a taking of property. 42 U.S.C. 4602. Finally, relocation assistance under subchapter II is contingent upon the acquisition of real property under a federal program or federally assisted program. 42 U.S.C. 4622(a). Under the settled law of Idaho

and a majority of the states a public utility does not acquire any right in public rights-of-way and places its facilities in those public rights-of-way at its own risk. There is no property right and, therefore, no eminent domain taking.

The Fourth Circuit Court of Appeals decision holding that the Chesapeake and Potomac Telephone Company of Virginia was a "displaced person" within the meaning of the Uniform Relocation Act is contrary to Consumers' Power Co. v. Costle, 615 F.2d 1147 (6th Cir. 1980). In that case a gas and electric company filed an action for declaratory and injunctive relief against the administrator of the Environmental Protection Agency. In count one of the complaint Consumers Power Co. sought compensation under the

real property acquisition section of the URA (subchapter III). The gas company claimed that it did not receive satisfactory assurances from the cities that fair compensation would be paid as required by 42 U.S.C. § 4655. On the other hand, in count two Consumers Power Co. claimed relocation compensation under the relocation section (subchapter II) and again alleged failure to receive satisfactory assurances from the cities as required by 42 U.S.C. § 4630.[2]

In the lower court the defendant EPA moved to dismiss the complaint on several grounds, arguing first that the plaintiffwas not a displaced person within the

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2. A summary of the utility's allegations in its complaint are found in the district court opinion, Consumers Power Co. v. Costle, 468 F. Supp. 375 (E.D. Mich. 1979).

meaning of the act, since there had been no acquisition of any real property interest; second, that the act created no new property rights; and third, the claim was not yet ripe for judicial review, since there had been no final agency action. The district court agreed and held that the utility was not a "displaced person" under the URA, stating with persuasive reasoning:

> The Uniform Relocation Assistance Act, 42 U.S.C. §§ 4601-4655, provides financial relief to persons, including corporations, injured by the acquisition of real property by a state or federal agency using federal funds. The language of the act makes it clear that it applies only in cases in which there has been an acquisition of property. Moorer v. Department of Housing & Urban Development, 561 F.2d 175, 178 (8th Cir. 1977); Whitman v. Missouri State Highway Comm'n, 400 F. Supp. 1050, 1067 (W.D.Mo. 1975). For example, subchapter II of the act makes benefits

available to "displaced persons", defined in the act as persons required to move "as the result of the acquisition of such real property." § 4601 (6); see also §§ 4622, 4625 and 4630. Subchapter III is entitled "Uniform Real Property Acquisition Policy," and every section in that subchapter is concerned with the consequences of the acquisition of property.

It is true that in some cases courts have construed the act to require relocation assistance even though the acquisition of real property was inadvertent, as, for example, in the case of HUD mortgage default. See Cole v. Harris, 571 F.2d 590 (D.C.Cir. 1977). However, most courts require that the acquisition be pursuant to a conscious governmental decision to dislocate in order to find an entitlement to benefits. See, e.g., Harris v. Lynn, 555 F.2d 1357 (8th Cir. 1977), affirming 411 F.Supp. 692 (E.D.Mo. 1976); Alexander v. United States Department of Housing & Urban Development, 555 F.2d 166 (7th Cir. 1977); Caramico v. Secretary of Housing and Urban Development, 509 F.2d 694 (2nd Cir. 1974). Under either interpretation of the act, however, there must be

an acquisition of property. Thus in order that plaintiff be entitled to relief under this act, it must first demonstrate that it has been damaged by the acquisition of real property in connection with a disbursement of federal funds.

It has been held, as the plaintiff argues, that a grant of the right to place and maintain pipes in a street is the grant of a property right. See, e.g., Owensboro v. Cumberland Telephone & Telegraph Co., 230 U.S. 58, 65, 33 S.Ct. 988, 57 L.Ed. 1389 (1913). However, the utility, which normally acquires its easement through a gratuitous grant, does not thereby acquire a right to any specific location in which to lay its pipes. New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453, 461, 25 S.Ct. 471, 49 L.Ed. 831 (1905). Tennessee v. United States, 256 F.2d 244, 258 (6th Cir. 1958). Thus, in the present case, although plaintiff has incurred and will incur costs as the result of the federal grants to the cities involved, it has not lost any property right, since it may still maintain its pipes in the same ground. New Orleans Gaslight Co., supra, 197

U.S. at 460, 25 S.Ct. 471; Detroit v. Michigan Bell Telephone Co., 374 Mich. 543, 554-55, 132 N.W.2d 660 (1965) (dissent), cert. denied, 382 U.S. 107, 86 S.Ct. 256, 15 L.Ed.2d 191 (1965); cf. Center Line v. Michigan Bell Telephone Co., 387 Mich. 260, 196 N.W.2d 144 (1972)(reimbursement dependent upon specific legislative provision). It certainly cannot be argued that the cities of Flint, Jackson, and Bay City have now acquired the right to lay gas pipeline or that they have taken that right from the plaintiff. In Detroit Board of Education v. Michigan Bell Telephone Co., 51 Mich.App. 488, 502, 215 N.W.2d 704, 711 (1974) aff'd, 395 Mich. 1, 232 N.W.2d 633 (1975), the Michigan Court of Appeals noted: "A distinction can be drawn between the shift of equipment to accomodate a drainage system and the total extinguishment of a vested property right." See generally Center Line v. Michigan Bell Telephone Co., supra (right of reimbursement resulting from legislative provision in Rehabilitation of Blighted Areas Act; no common law right). The cost of relocation is not the acquisition of a property right but rather the cost of doing business.

Center Line, supra, 387 Mich. at 267, 196 N.W.2d 144 (Swainson, J., dissenting).

On appeal the Sixth Circuit Court of Appeals found that the utility's complaint stated no cause of action under presently applicable state and federal law and affirmed the decision of the district court on all grounds. The opinion is, however, somewhat misleading, since it does not focus on whether a public utility is a "displaced person" under the URA. A close reading of the district and circuit opinions show that both cases stand for the proposition that a "public utility" is not, in fact, a "displaced person" under the URA.

The Sixth Circuit Court of Appeals in Consumers Power Co. v. Costle, supra, devoted considerable attention to the issue of whether or not the utility had a

claim for compensation under 42 U.S.C. § 4655 which is in subchapter III of the URA. The Sixth Circuit, however, quoted with approval the district court's discussion of permissive use of public rights-of-way by public utilities. Finally, the circuit court held that utility's complaint stated no cause of action under applicable state and federal law. This holding necessarily denies the utility's claim for reimbursement under subchapter II of the URA and specifically 42 U.S.C. § 4630 and 42 U.S.C. 4622. Therefore, despite the court's attention to compensation under subchapter III of the URA, the Consumers Power Co. decision is contrary to the decision of the Fourth Circuit Court of Appeals in the instant case, since the Sixth Circuit expressly held the utility was not a "displaced

person" within the meaning of the URA and as such represents a split of authority among the circuit courts.

IV.

THE CALIFORNIA RELOCATION ACT PROVIDES BY ANALOGY PERSUASIVE AUTHORITY THAT THE PLAINTIFFS ARE NOT ENTITLED TO RELOCATION BENEFITS UNDER THE UNIFORM RELOCATION ACT

California case law holds that a public utility is not a "displaced person" under the state relocation act. In 1970, the Congress enacted the Uniform Relocation Act requiring the federal government to provide relocation and advisory assistance to affected persons, and that it follow uniform acquisition policies, whenever it acquired real property under its power of eminent domain. In 1971, the California Legislature

amended and augmented its relocation assistance law to parallel the 1970 federal enactment and to extend comparable benefits statewide and payable by the state and its political subdivisions to persons affected by the acquisition of land under its eminent domain. See, City of Mountain View v. Superior Court, 54 Cal. App.3d 72, 126 Cal. Rptr. 358 (1975).

Under the California Relocation Act a displaced person is defined as:

> . . . Any person who moves from real property, or who moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, by a public entity or by an person having an agreement with or acting on behalf of a public entity, or as the result of a written order from a public entity to vacate the real property, for public use. . .

Gov. Code, § 7260(c).

This definition of "displaced person" parallels and is almost identical to the definition of "displaced person" in 42 U.S.C. § 4601(6) with the only difference being California's modification of the definition of "displaced person" to conform to its state rather than federal programs.

The case of Pacific Telephone & Telegraph Co. v. Redevelopment Agency of the City of Glendale, 87 Cal. App.3d 299, 151 Cal. Rptr. 68 (1978), specifically addressed the issue of whether or not a public utility was a "displaced person" under the California Act. The City Council of Glendale adopted a redevelopment plan for a shopping center, and the enabling ordinance pledged the City of Glendale to cooperate with the Redevelopment Agency in closing, vaca-

ting, widening or changing the grades of streets, alleys and other public rights--of-way in the project area. Pacific Telephone and Telegraph Company had for a number of years owned, maintained and operated underground telephone cables and related facilities within the redevelopment area. The Redevelopment Agency notified the utility that it would be required to relocate or protect its telephone facilities to make way for the redevelopment project, since one of the affected streets would be vacated. The utility relocated its facilities subject to the parties' agreement to litigate the Redevelopment Agency's liability for reimbursement of the relocation cost. The utility filed suit to compel payment of its relocation cost contending such payment was required under Government Code

§ 7262 (The California Relocation Act). The trial court held that as a matter of law the utility was not entitled to such benefits and must bear its own expenses of relocating its facilities. The court of appeals affirmed the trial court stating:

> We find no merit to appellant's argument that the legislature has specifically so provided in the relocation assistance law. That law provides that as a part of the cost of acquisition of real property for a public use a public entity shall compensate a displaced person for his "[a]ctual and reasonable expense in moving himself, family, business, or farm operation, including moving personal property." (Gov. Code, § 7262, subd. (a)(1).) "Person" is defined to include a corporation, and "business" is defined to include any lawful activity conducted primarily for the sale of services to the public. (Gov. Code, § 7260, subds. (b),(d).) "Displaced person" means "any person who moves from real

property, or who moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, by a public entity or by any person having an agreement with or acting on behalf of a public entity, or as the result of a written order from a public entity to vacate the real property, for public use." (Gov. Code, § 7260, subdv. (c).)

Appellant contends that these definitions are all-inclusive, and that appeallant fits within them, as being a person who was compelled to move its personal property, to wit, telephone cables, as a result of the vacating of the street for a public use. Appellant contends that since no provision of the relocation assistance law specifically excludes reimbursement of utility relocation costs, the broad general definitions indicate a legislative intent that the common law rule not apply.

We disagree. An intent to exempt utilities from the common law rule cannot be inferred merely from the broad general definitions used in the relocation assistance law. There are

numerous statutes in which the Legislature has specifically and expressly provided for reimbursement of utility relocation expenses. [citation omitted.] As stated in Pacific Tel. & Tel. Co. v. Redevelopment Agency, supra, 75 Cal. App. 3rd at page 965, footnote 4, 142 Cal. Rptr. at page 589, n. 4, "When the Legislature intends that a utility be reimbursed for its relocation costs, it has said so in specific and direct language [citing examples]." There the court rejected a similar argument by Pacific Telephone and Telegraph Company that the general definitions used in the community redevelopment law impliedly showed a legislative intent to avoid the common law rule. (Id., 75 Cal. App. 3rd at pp. 962-968, 142 Cal. Rptr. 584). So here, it is reasonable to assume that had the Legislature intended the common law rule not to apply, it would have adopted language similar to that found in the many other acts wherein it specifically provided for reimbursement. (L.A. County Flood Control Dist. v. Southern Cal. Edison Co., supra, 51 Cal.2d at p. 337, 331 P.2d 1).

> Whether the costs of such relocation should be shifted from the utility's rate payers to other taxpayers is a matter of policy for the Legislature to determine. (Pacific Tel & Tel Co. v. Redevelopment Agency, supra, 75 Cal. App.3d at p. 968, 142 Cal. Rptr. 584, A Study Relating to Sovereign Immunity, supra, 5 Cal. Law Revision Com. Rep., p. 80; Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria (1971) 44 So.Cal.L.Rev. 1, 53-56 (1971); Note 6 UCLA L.Rev. 336, 338 (1959).) The Legislature has not so shifted the burden in the relocation assistance law.

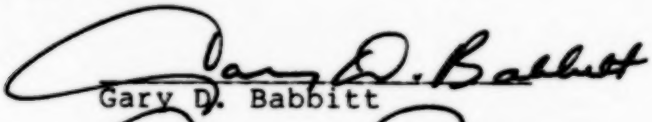
The same reasoning employed by the Court in Glendale is applicable to the instant case. The URA's definitions are not all inclusive. In an urban renewal project where local funds are included with federal funds it is inconceivable that Congress would intend to legislate a change in state law affecting the use of local monies without expressly so stat-

ing. In the absence of express language to the contrary, Congress should not be presumed to have altered the common law rule.

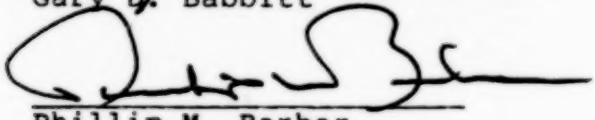
CONCLUSION

We ask that this Court accept review of the decision of the Court of Appeals for the Fourth Circuit in Norfolk Redevelopment and Housing Authority v. The Chesapeake and Potomac Telephone Company of Virginia, and that it reverse that decision. We further ask that this Court hold that public utilities in states which allow gratuitous use of public rights-of-way with no real property interest in those rights-of-way, are not "displaced persons" with a right to relocation funds under 42 U.S.C. 4601 et seq.

Respectfully submitted this 22nd day of July, 1982.



Gary D. Babbitt



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CHAPTER 2. SITE CLEARANCE

ELIGIBLE ACTIVITIES

Site clearance may include the following within the project area when necessary for carrying out the objectives of the Urban Renewal Plan:

(1) Demolition of structures, removal of slabs on grade, removal of foundations to required elevations, breaking up basement slabs to prevent seepage, and filling of basements with suitable material.

(2) Breaking up and removing of abandoned street paving, curbs, gutters, and sidewalks.

(3) Necessary removal of abandoned utility mains and adjustments to facilities which are to remain.

(4) Moving of acquired structures on their present lots or on other lots within the project area, except that expenditures for improving the structures, providing new foundations or utility connections, landscaping, and similar items involved in preparing the property for resale are ineligible.

(5) Moving structures of historic or architectural value which will be restored and maintained for historic or architectural purposes.*

(6) Relocating underground of overhead utility distribution lines. (See below.)

The cost of these site clearance activities may be charged to Item 1 of Gross Project Cost or may be offered as an Item 2 noncash local grant-in-aid.

*MOVING STRUCTURES OF HISTORIC OR ARCHITECTURAL VALUE WHICH WILL BE RESTORED AND MAINTAINED FOR HISTORIC OR ARCHITECTURAL PURPOSES.[1]/

General Conditions and Requirements

The following conditions govern the moving of structures of historic or architectural value which will be restored and maintained for historic or architectural purposes:

1. Properties must conform with criteria to demonstrate historic or architectural value. (See 7207.1, Project Planning, Chapter 2, pages 4 through 4-5.)

1/With reference to moving activities, the term "structures" includes by definition "structures" and "buildings".

2. The moving must be clearly necessary to accomplish the objectives of the Urban Renewal Plan. The LPA must consider alternative plans which would permit the structure to remain in its present location, and must demonstrate why the objectives of the Plan could not be accomplished by any of these alternative plans.

3. The structure may be moved to any site within the urban renewal area or to any site outside of the urban renewal area which is within the locality subject to HUD review and approval. In all cases, the LPA must show that the proposed relocation site is suitable. If the structure is to be moved outside of the urban renewal area, the LPA must comply with the "Conditions Under Which Buildings May be Moved Off-Site." (See below.)

4. The exterior of any structure moved and resited at project expense shall be accessible to the public view at its relocation site. Public access to the interior of the structure is not required.

5. The LPA need not own the structure in whole or in part either before, during or after the actual moving. The LPA must, however, undertake the moving itself, either by letting contracts or with force account labor, in accordance with appropriate loan and grant contract provisions and Department regulations.

6. The structure need not require restoration to be eligible for moving.

7. The moved structure must be restored, if necessary, and it must be maintained for historic or architectural purposes. The latter must be assured by the LPA in accordance with the following:

a. If the structure is to be moved to a site within the urban renewal area which is not owned by the LPA, the owner of the relocation site must record in his deed, in accordance with local practice, a covenant running with the land which assures restoration and maintenance of the structure for historic or architectural purposes, puruant to criteria established by the LPA. This deed restriction should be recorded prior to moving of the structure, if possible. If not possible, an LPA-owner agreement must assure that the deed restriction will be recorded after the moving. An LPA-owner agreement by itself is not sufficient to guarantee the legislative objectives for restoration and maintenance.

b. If the structure is to be moved to a site outside the urban renewal area, the same procedure as in "a" above must be followed, but the municipality must be a party to the covenant. As part of the final approval of this procedure, there must be assurance that the munici-

pality has the legal authority to enforce the covenant.

c. If the structure is to be moved to a site owned by the LPA within the urban renewal area, disposition documents shall reflect restoration and maintenance requirements. (See 7207.1, Project Planning, Chapter 2, pages 4 through 4-5)

8. The LPA shall determine that the owner of the structure possesses the qualifications and financial resources (or can reasonably be expected to have such resources) to restore the property as necessary and to maintain it for historic or architectural purposes.

9. Structures acquired by the LPA for relocation or removal to another site shall be disposed of at fair market value.

Eligible Project Costs

The following are eligible project costs:

1. Moving of the structure from the original to the relocation site.

2. Rough grading of the relocation site and provision of a suitable foundation for and necessary utility connections to the moved structure.

3. If shown to be the most feasible method for moving, dismantling of the structure, marking and crating of the

pieces, and reassembling of the pieces on the relocation site. If storage charges are incurred, they will be eligible project costs only for the period during which project activities preclude the moving of the crated pieces to the future site.

4. Other activities which are clearly incidental to the moving.

5. $50,000 is the maximum which the project may incur for the activities listed in items 1-4 above for any single structure. This amount may be used in conjunction with other public or private funds if moving costs exceed $50,000.

CONDITIONS UNDER WHICH BUILDINGS MAY BEMOVED OFF-SITE

The cost of moving buildings off-site may not be charged to the project unless, as discussed above, the buildings are of historic or architectural value and will be restored and maintained for historic or architectural purposes.

However, the LPA may permit owners or purchasers to relocate buildings to sites outside of the project area, subject to requirements and restrictions that are adequate to assure that each building will be established on a suitable new site and be a sound and standard structure in every respect. In order to give assurance that urban renewal operations in one section of a community will not result in the creation or expansion of blighted conditions in another area, the

LPA shall obtain prior HUD approval for the moving of buildings off-site.

To obtain HUD approval, the LPA shall submit a full description of the circumstances under which buildings would be moved. The description shall include:

(1) Type and number of structures proposed for off-site moving.

(2) Size of the lots on which the buildings might be located.

(3) Type of land use that would be acceptable in areas to which the buildings would be moved.

(4) Steps to be taken to prevent moving of residential structures in other deteriorated areas or in good residential areas where incompatibility of the moved structures with existing development might produce blighting influence.

(5) Requirements relating to zoning and to environmental factors, such as conditions of streets and other public utilities, adequacy of community facilities, and accessibility and adequacy of public transportation.

(6) Requirements relating to the physical character or condition of structures and compliance with local codes and regulations which are to be made a condition of their relocation.

REMOVAL OR RELOCATION OF PRIVATELY OWNED UTILITY LINES

Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expenditure unless compensation to the company is required under applicable State statutes, judicial decisions, or preexisting local ordinances or provisions of the company's franchise. If the LPA is required to compensate the utility company for proposed changes, the necessity for making the changes and the basis used in computing the estimated amount of such compensation shall be described. A legal opinion as to the obligations of the LPA to provide the compensation shall be described. A legal opinion as to the obligations of the LPA to provide the compensation indicated shall be provided with the Part I Loan and Grant Application. (See 7209.1, Site Preparation and Project Improvements, Chapter 3.)

UNDERGROUND PLACEMENT OF UTILITY DISTRIBUTION LINES

While the policy on conformance with local standards set forth in 7209.1, Site Preparation and Project Improvements, Chapter 1, is applicable to utility distribution lines that are eligible as project improvements, the policy is not applicable to the underground placement of these lines. Justification for underground placement need not be submitted to HUD.

The cost of underground placement of utility distribution lines is not eligible for inclusion in Gross Project Cost when special circumstances, such as adverse subsurface conditions or the limited extent of contemplated project improvements in the affected area, would make the cost exceptionally high in relation to the benefits to be derived.

Publicly Owned Utility

The full cost of relocating existing overhead lines underground, and the full cost of construction required to place new services underground are eligible as project costs. The eligible cost of the service lines themselves will be based, as appropriate, either on the "improvements of excess size or capacity" policy set forth in 7209.1, Site Preparation and Project Improvements, Chapter 1, or on policies applicable to the determination of relative benefit of supporting facilities. (See 7216.1, Local Grants-in-Aid, Chapter 2, Section 2.)

Privately Owned Utility

To the extent that a utility company may not legally be required (under applicable State statutes, local ordinances, judicial decisions, or provisions of the company's franchise) to relocate existing lines underground or to install new lines underground, Item 1 project costs may include compensation to the company for the actual cost of relocating existing lines underground or installing new lines underground.

(1) If the company may legally be required to relocate existing lines or install new lines underground, no part of the cost is eligible.

(2) If the company may legally be required to relocate existing lines or to install new lines at its own expense, but not to install the relocated or new lines underground, compensation not exceeding the cost of underground installation less the estimated cost of providing the same service with the same capacity through an overhead system is eligible.

(3) If the company may not legally be required to relocate existing lines or to install new lines underground, compensation for the full cost of relocating the existing lines or installing the new lines underground is eligible.

With the Part I Loan and Grant Application, the LPA shall submit a legal opinion establishing what the utility company may or may not legally be required to do at its own expense.

If the underground installation affects the character of privately owned street lighting standards to be installed, Item 1 project costs may include the actual cost of standards and fixtures installed, less the estimated cost of standards and fixtures which would have been provided under existing practice in the locality.

CERTIFICATE OF MAILING
AND SERVICE

I, PHILLIP M. BARBER, being first duly sworn, hereby certifies:

1. I am a member of the Bar of this Court, having been admitted thereto on the 18th day of April, 1977, and that I make the following affidavit from my own personal knowledge.

2. Pursuant to Rule 28.2, _____ copies of the Brief Amicus Curiae in support of Petitioner of the City of Boise, Idaho, and the Boise, Idaho, Redevelopment Agency and the motion of the Boise Redevelopment Agency for leave to join in the Brief Amicus Curiae has been deposited in the United States Post Office in Boise, Idaho, with first-class postage prepaid affixed, properly addressed to the Clerk of this Court, this 22nd day of July, 1982, within the time for filing the same, by your affiant.

3. Pursuant to Rule 28.3 three copies of the said document have been served upon each of the following persons by depositing the said three copies in the United States Post Office in Boise, Idaho, with first-class postage prepaid attached thereto, addressed to those persons, this 22nd day of July, 1982, by your affiant.

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_____
Phillip M. Barber

SUBSCRIBED and SWORN to before me this

____ day of July, 1982.

_____
Notary Public for Idaho
Residing at Boise, Idaho